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Mr. Dick Smith
Chairman of the Board
Arizona Coliseum Exposition Center
P.O. Box 6715
Phoenix, Arizona 85005

Dear Mr. Smith:

This is in response to your letter of June 9, 1975. You have advised us that during the term of the "Coliseum Lease Agreement" with the Phoenix Professional Basketball Club, it became necessary to cancel a basketball game contracted for because the roof of the Coliseum leaked to an extent that playing the game was impracticable, if not impossible. The Board has requested our opinion whether it is liable to the lessee, Phoenix Professional Basketball Club, for damages arising out of this cancellation. If so, the Board wishes to know whether payment of a settlement out of State funds is authorized.

First, on the issue of liability, the lease itself contains two significant provisions. Section 14, on page 8, of the lease, provides:

> A. It is mutually agreed by both parties that in the event of war of (sic) state of national emergency, labor disputes, disaster, closure of coliseum by governmental authority, riot, civil disturbance, quarantine, power failure, damage to building, flooding of the Coliseum or parking facilities, proclamation or decree of any governmental authority, act of God or public enemy, or any other cause beyond the control of the Board and BB, including but limited to player boycotts, neither party shall be liable to the other for damages arizing from said referenced events. In such event, BB shall be relieved of the payment of rental to the Board for any such playing dates that said above referenced circumstances exist. (Emphasis added.)

This clause is basically a statement of the common law of contracts on the subject of impossibility of performance as an excuse for nonperformance. See also Restatement of Contracts, Section 457 (1932):

> Except as stated in Section 455, where, after the formation of a contract, facts that a promissor had no reason to anticipate, and for the occurrence of which he is not in contributing fault, render performance of the promise impossible, the duty of the promissor is discharged, unless a contrary intention has been manifested, even though he has already committed a breach by anticipatory repudiation; but where such facts occur after the time when performance of a promise is due, they do not discharge a duty to make compensation for a breach of contract.

The key elements of establishing impossibility as an excuse for nonperformance are:

1. The risk was not foreseeable.

2. The nonperforming party was not at fault in contributing to the nonperformance.

3. The risk was not assumed expressly or impliedly by either party to the contract.

4. Performance is impossible or impracticable in a commercial sense.

Garner v. Ellingson, 18 Ariz. App. 181, 501 P. 2d 22 (1972); See also Chicago, Minn. & St. Paul R. Co. v. Hoyt, 149 U.S. 1 (1893); Pearce - Young - Angel Co. v. Charles R. Allen, Inc., 213 S. C. 578, 50 S. E. 2d 698 (1948).

The second significant provision is Section 9 at p. 6. It could be strongly argued by the Phoenix Professional Basketball Club that the Board had assumed the risk of rain leakage in the Coliseum by contracting to provide the arena and further warranting in that Section:

> MAINTENANCE OF PREMISES: The Board shall have sole responsibility for cleaning and maintaining the Coliseum and all of its equipment and facilities in a good, safe, sanitary state of

> condition and repair at all times during the term hereof, including but not limited to seats, chairs, stands, parking areas, playing areas, ramps, hallways, restrooms, spectator areas, and all other public areas used in any event. BB shall have no obligation, liability or responsibility of any nature for cleaning, repairing, replacing, or maintaining any portion of the Coliseum or any of its equipment, facilities, walkways parking areas, or other areas. (Emphasis added.)

This clause suggests that the Board assume responsibility for keeping the Coliseum in a suitable state of repair. If the water leakage can be traced to a failure to keep the Coliseum suitably maintained, the Board must assume liability for loss which results.

This interpretation of the Board's assumption of risk is consistent with general notions of impossibility. One traditional requirement for claiming impossibility as a defense is that the party seeking to be discharged from responsibility had no opportunity to prevent the occurrence. Responsibility which is caused by the promissor, or which he could have avoided or corrected by appropriate corrective measures, does not excuse him from liability for nonperformance. See Restatement of Contracts Section 457, supra; Brumer v. Franklin County Distilling Co., 135 F. 2d 384, cert. denied 320 U.S. 750 (6th Cir. 1943); Martin v. Star Publ. Co., 50 Del. 181, 126 A. 2d 238 (1956); Ogdensburg Urban Renewal Agency v. Moroney, 42 App. Div. 2d 639, 345 N. Y. S. 2d 169 (1973); Helms v. B & L Invest. Co., 19 N. C. App. 5, 198 S. E. 2d 79 (1973).

Whether the Board is liable in this case turns on whether the water leakage can be attributed to the Board. If the Board could have prevented the damage by proper repairs, it will be held liable for the loss to the Phoenix Professional Basketball Club. The liability will be placed on the Board either (a) because it expressly assumed the responsibility for keeping the Coliseum in a proper state of repair, or (b) because its responsibility in the cause of what rendered the contract impossible to perform will prevent the Board from asserting impossibility in an action for breach of contract by the Phoenix Professional Basketball Club.

The Board can avoid liability only if it can prove that the water leakage was truly unforeseeable--an act of God which could not have been prevented by the exercise of due care in maintaining the premises. In citing the different types of impossibility that will excuse performance of

the contract, the lease in section 14, supra, names "flooding" of the Coliseum or parking facilities and "any other cause beyond the control of" the two parties. This indicates that if the occurrence which caused the cancellation can be characterized as flooding, the two parties will have to bear the risk equally: The Basketball Club is not liable for rent and the Board is not liable for losses to the Club as a result of the cancellation of the game. It is significant, however, that even though the lease contains a clause that may cover the occurrence in question, the Board cannot claim impossibility under this clause if it is responsible for the cause of the impossibility. Dail-Overland Co. v. Willys-Overland, 263 F. 171, aff'd sub nom 274 F. 56 (6th Cir. 1921).

By way of conclusion, the issue of the liability of the Board is governed by risk allocation: If the Board can be said to have assumed to become responsible for the risk of water leakage which could cause cancellation of the game, the Board will bear the loss in this case. If, under the circumstances, the risk can fairly be attributed to the Board, the loss of the Basketball Club creates a liability on the Board. It appears that inasmuch as the Board is directly responsible for repairing the Coliseum, the Board is liable.

It strikes us, however, that some of the damages claimed by Phoenix Professional Basketball Club may not be proper. Damages for breach of contract are such as may fairly and reasonably be considered as arising naturally from the breach itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of its breach. Hadley v. Baxendale, 146 Eng. Rep. 145 (Exch. 1854); Cole v. Atkins, 69 Ariz. 81, 208 P. 2d 859 (1949). The party injured by a breach of contract has a duty to mitigate the damages as much as possible. Coury Bros. Ranches, Inc. v. Ellsworth, 103 Ariz. 515, 446 P. 2d 433 (1968); Rio Grande Oil Co. v. Pankey, 50 Ariz. 529, 73 P. 2d 707 (1937). This duty involves avoiding the consequences of the breach as much as possible. State ex rel. Herman v. Schaffer, 110 Ariz. 91, 515 P. 2d 593 (1973). Damages are not recoverable for expenses that the plaintiff should have foreseen and could have avoided without undue risk, expense, and humiliation. Coury Bros. Ranches, Inc. v. Ellsworth, supra.

It appears, in this case, that the Basketball Club made certain expenditures for refunds to customers which may not have been necessary. The Basketball Club is not entitled to incur damages which were avoidable

under the circumstances. The key issue is whether the Basketball Club was required to make refunds or whether it simply was obligated to exchange the tickets for the cancelled game for another game. If its contractual obligation to the ticket purchasers was only to make exchanges, then $8,414.00 of the damages claimed by the Basketball Club are not proper. Only the $8,744.00 incurred in the exchanges is a proper element of damages.

The common law rule regarding the liability of the Basketball Club to the purchasers is that even though impossibility exists so as to relieve the Club from performing, the Club cannot retain the benefits already received. In other words, the Club would have to return the money paid for the tickets. Cochran v. Forbes, 257 Mass. 135, 153 N.E. 566 (1926); A. Corbin, Contracts, Section 1368 at 519 (1951). However, it is customary with athletic tickets for the parties to provide contractually on the ticket that the only obligation of the ticket seller is to permit exchange of the ticket for a ticket to a new game. If this is the case with the tickets sold by the Phoenix Professional Basketball Club, then the refunds were not required to be made and cannot be claimed as damages for breach of the lease agreement by the Board.

With respect to payment of damages, the Board is not authorized directly to allow and settle damage claims and to expend state funds in payment thereof. Two alternative procedures, one of which must be followed, are set forth below. One procedure is set forth in A.R.S. Section 12-821 to 826. This involves the Club's presenting to the Board a claim for money for breach of contract. State v. Brooks, 534 P.2d 271 (1975). If the Board denies liability and disallows the claim, the Basketball Club then may bring an action in court. A.R.S. Section 12-821. If the Club obtains a judgment, it is reported to the Legislature for payment by appropriation. A.R.S. Section 12-826.

The other procedure likewise calls for the Club to present a claim to the Board. If it appears that some or all of the claim should be allowed, i.e., the Board is liable, the Board may authorize the Attorney General to compromise or settle the claim as provided in A.R.S. Section 41-192.B.4. When the claim has been settled and approved by the Board, the Board then should forward the approved claim to the Assistant Director for the Division of Finance who will, if an appropriation has been made to pay the claim, draw his warrant upon the Coliseum and Exposition Center Fund or other appropriate account in the State treasury. A.R.S. Section 35-181.01, 35-185. If

an appropriation has been made to pay the claim, the Division of Finance will audit and adjust the claim, give the claimant a certificate of the amount and report it to the next regular session of the Legislature. A. R. S. Section 35-189.

Assuming for purposes of concluding this opinion that the Board is liable and approves a claim of the Basketball Club, we must determine whether an appropriation has been made to pay the claim. Appropriations to the Board for fiscal year 1974-1975, during which the basketball game in question was scheduled, appear in ch. 203, Section 1, (1974), Ariz. Sess. Laws 1164, as follows:

> Subdivision 3. ARIZONA COLISEUM AND EXPOSITION CENTER BOARD
>
> All collections paid into the state treasury are appropriated for personal services, operating expenditures and capital outlay.

The only category of appropriation from which the Basketball Club's claim arguably might be paid is "operating expenditures". Neither the courts of this State nor the Attorney General has considered heretofore the question whether included within the scope of an appropriation for "operating expenditures" is authorization to pay damage claims for breach of contract. According to one appellate court, " ' (O) perating expenses' usually cover physical maintenance, and may include administration, labor, taxes, rent, insurance, claims, litigation expenses, etc., depending upon how the phrase is used in a particular case". Powell v. City and County of San Francisco, 62 Cal. App. 2d 291, 144 P. 2d 617, 621 (Cal. Dist. Ct. App. 1944). In this case the question then is what expenditures the Legislature intended to be covered by the appropriation to the Board for "operating expenditures". The Coliseum and Exposition Center Board is a budget unit of the State within the meaning of A. R. S. Section 35-101 and, as such, is required to comply with the requirements of Chapter 1, Title 35, Arizona Revised Statutes. Among those requirements is the presentation to the Governor and the Legislature of statements and explanations stating financial requirements and appropriation requests. Therefore, underlying the appropriations cited above from Chapter 203 of the Laws of 1974 is the budget estimate and budget program of the Board. We understand that the budget estimates and programs of the Board do not contain any provision or request for an appropriation to pay damage claims resulting from a breach of contract

by the Board. In the absence of such a provision or request, we cannot say that the Legislature intended that appropriations to the Board for operating expenditures included authorization to pay damage claims for breach of contract. That being the case, the provisions of A.R.S. Section 35-189 supra, apply to the instant claim.

Sincerely,

BRUCE E. BABBITT
Attorney General

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